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No. 94-2111

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

MICHAEL DUTTON, WARDEN

Petitioner,

v.

RICHARD HOUSTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Although substantial evidence supported Mr. Houston's defense that the killing occurred accidentally and not maliciously as the State claimed, the trial court twice instructed the jury to presume that the killing was malicious and not accidental. The State concedes that both instructions violated the Due Process Clause. The question presented is whether the District Court and Court of Appeals erred in finding, based on comprehensive analyses of the record, that instructions to presume the validity of the State's theory and to reject the defense had a substantial and injurious affect on the jury and were not harmless.

2. Mr. Houston was sentenced to die on the basis of a "heinous, atrocious, or cruel" aggravating circumstance that was not defined at trial or on appeal and was not supported by the evidence. The State concedes that reliance on this undefined and unsupported circumstance violates the Eighth Amendment. The question presented is whether, under the circumstances of this case, the District Court and Court of Appeals erred in holding that state and not federal courts are the proper forum to evaluate the relative strength of the remaining aggravating and mitigating circumstances following the invalidation of the heinousness circumstance.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Richard Houston, respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. *Proceedings Below*

On May 20, 1994, the District Court granted habeas corpus relief from Mr. Houston's conviction and death sentence for murder on four grounds – burden-shifting instructions conceded by the State to violate the rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979); insufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979); prosecutorial comments on Mr. Houston's failure to testify; and the trial court's prejudicial shackling of

Mr. Houston in front of the jury. The Court also granted relief from Mr. Houston's robbery conviction and life sentence on the "comments on silence" and shackling grounds. It granted relief from Mr. Houston's death sentence on three grounds — the sentencer's reliance on the "heinous, atrocious, or cruel" aggravating circumstance, also conceded by the State to be unconstitutional, and two instructional errors.[1]

The United States Court of Appeals for the Sixth Circuit (Merritt, C.J., Guy and Ryan, JJ.) affirmed in part, reversed in part, and remanded. The Court affirmed as to the two errors the State conceded. App. 1-2, 8-14. It reversed relief from the murder conviction under *Jackson v. Virginia* and reversed all relief from the robbery conviction, ruling that any error as to the robbery was harmless under the rule of *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). App. 3-7, 14-16. The Court "pretermit[ted]" ruling on the "comments on silence" and shackling errors as to the murder conviction and on the two instructional errors at the sentencing trial. App. 1.

The State did not seek rehearing or rehearing *en banc*.

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[1]App. 17, 70. Mr. Houston filed his habeas corpus petition on August 29, 1986. The State finally answered the petition on October 7, 1988, after twice being ordered to do so and after four extensions. App. 20; R. 4, 5, 7, 10, 14, 21, 22, 25. Mr. Houston thereupon filed a Motion for Summary Judgment and supporting memorandum, and the District Court pronounced the case "ready for immediate final resolution" once the State responded to the motion. R.32, 47, 77 (1/31/90 Mem. at 57). The State never did so. App. 20. On April 28, 1993, the State agreed to file a timely response to an updated summary judgment motion. R. 118-20. The District Court granted that motion on May 20, 1994.

"Pet." refers to the Petition for a Writ of Certiorari. "App." refers to the Appendix to the Petition for a Writ of Certiorari. "R." refers to the docket number of documents filed in the district court that are part of the record on appeal. "T." refers to the trial transcript. "Ex." refers to trial exhibits. "T.R." refers to the Technical Record of trial.

The Court of Appeals' reversal and remand necessitates further proceedings in the District Court on several fact-based claims challenging Mr. Houston's robbery conviction and life sentence. Those proceedings are governed by a scheduling order directing that evidentiary proceedings occur within short time frames. R.120, ¶¶ 4-7. Among the claims waiting to be heard are several that apply to the murder as well as the robbery conviction, including prosecutorial suppression of evidence, physically coerced confession, denial of counsel of choice when Mr. Houston was not allowed to replace his retained attorney who was killed the night before trial, and ineffective assistance by the appointed lawyer ordered to proceed in the absence of retained counsel. R.1. Over Mr. Houston's objection, further proceedings in the District Court have been suspended pending resolution of this Petition. Order, May 15, 1995.

B. The Evidence at the Guilt-Innocence Trial

Mr. Houston was tried for the malice murder and robbery of Stanley Balsinger. For tactical reasons, the State waived felony murder.[2]

Mr. Houston admitted shooting Mr. Balsinger. The issue at trial was the mental state with which the shooting occurred. The State contended that Mr. Houston maliciously "executed" Mr.

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[2]The State took on the burden of proving malice murder rather than felony murder because it doubted a jury would impose a death sentence on the facts of the case and wanted to maximize Mr. Houston's term of years by avoiding a state rule merging felony murder (but not malice murder) and the underlying felony into a single crime and sentence. T. 33, 598; T.R. 53; *Houston v. State*, 593 S.W.2d 267, 279 (Tenn. 1980) (Henry, J., dissenting).

Balsinger by shooting him in the face while he was standing and in the stomach and the chest after he fell to the floor.[3] App. 4. Mr. Houston contended "that the killing occurred by accident as a result of a struggle over the gun, a theory inconsistent with malice." App. 10, 37.

The Petition describes the evidence supporting the "prone when killed" theory. Pet. 4-8. The Court of Appeals found that evidence constitutionally sufficient but not compelling. App. 3-5, 12.

The Petition does *not* describe the evidence showing that the victim was standing and struggling over the gun when all three shots fired accidentally. The Court of Appeals found that evidence "'substantial.'" App. 11. That evidence is described below:

Kenneth Hill discovered Mr. Balsinger on the floor of the washroom. As revealed by a photograph the State introduced at trial, the victim was lying in the position of a man who had been standing in front of the sink on the rear wall of the washroom facing the door on the opposite wall and who fell forward toward the door. He was lying on his stomach, on top of all three entrance wounds. Ex. 32; T. 489.

Another photograph shows what appear to be three bullet-impact marks on the rear wall of the washroom – two on the metal frame of a mirror above the sink, 10½ wall tiles (42") above the floor; a

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[3]At trial, the State also argued that Mr. Houston robbed Mr. Balsinger in the station office and "marched" him to the washroom. App. 12. "This scenario is dubious in light of evidence that the gas station was probably closed and locked before the robbery," App. 12, and the State abandoned the theory on direct appeal and in postconviction proceedings.

third on a wall tile 2½ tiles further up (52" above the floor) and a few tiles to the right. Ex. 39.

All three bullets exited the victim's back and clothing. No bullet damage was found on the concrete floor or anywhere on the ceramic-tiled walls near the floor. None of the bullets was found underneath the victim – one was in the sink drain; another in a corner of the washroom; and a third near the victim's right biceps. T. 356-58, 476-77; Ex. 32.

All three bullets exited lower on the victim's body than they entered. A straight line connects each entry wound to a corresponding exit wound and impact mark on the wall, if the victim was standing but bent forward when the shots were fired. T.R. 20, 26; T. 478-79; Ex. 39, 42.

According to a statement signed by Mr. Houston a few hours after the killing and introduced by the State at trial, Mr. Houston went to the gas station to use a phone. As the attendant was entering the washroom, Mr. Houston asked him about the phone:

> "I noticed a green wallet sticking out of his right pocket. I just decided to take it. I had no place to live in the last week, and my ... wife and I split up. When I approached him, when I stepped towards him, I pulled a gun out of my waistband. He saw me and grabbed the pistol barrel ...."

The two men struggled for the gun – the victim, further inside the washroom, pulling the pistol towards him; Mr. Houston, closer to the door, pulling the pistol away from the victim:

> "I said, 'Man, just let me go out of the bathroom, just let me go out of the bathroom, just let me get away.' Both of us was still wrestling for the pistol. The bathroom was shut, and it was dark.... I was trying to pull the pistol out of his hand, and the pistol started going off. It started going off. It fired two, three, four times." T. 455-56.

Pamela Taylor, who drove to the gas station with Mr. Houston, testified for the State that Mr. Houston went to the station intending to use the phone, spoke of no plan to rob the station, returned to the car looking shaken and "scared," had a bloody cut on his finger that was not there when he left the car, and said that he shot the man in the filling station but was not sure he was dead. T. 518, 520, 521, 535, 548.

The detective who took Mr. Houston's statement said that "[n]othing in the statement ... indicates that [Mr. Houston] planned to murder anybody at that gas station" or "had any intent to kill Mr. Balsinger"; "the statement reflects that ... there was a killing ... because there was a struggle for the gun." App. 37-38.

The state's expert pathologist testified that, from the physical evidence, one "cannot" and he "didn't know what position Mr. Balsinger was in when he was shot"; that he would make no "attempt to [say] what order they [the wounds] were made in"; and that the "contact wound[s]" to the chest and stomach and the noncontact wound to the face were "consistent with a ... struggle between two men in which a shooting could occur." App. 38-39; T. 479, 481, 476.

The only other witness the State called to testify about the circumstances of the killing, a ballistics expert, demonstrated the pistol's sensitive trigger and tendency to fire multiple shots in rapid succession, and agreed that the evidence "is consistent with the possibility of a struggle for the gun." App. 39; T. 456-57,

468-69, 587.[4]

REASONS FOR DENYING THE PETITION

I. The Judgment Is Not Ripe for Review Because it Is Not Final

The judgment before the Court is not final. Mr. Houston's habeas petition challenges both his murder and robbery conviction and the capital and life sentences imposed for those convictions. The Court of Appeals reversed the District Court's grant of relief from the robbery conviction and remanded. On remand, evidentiary proceedings are required on the claims attacking the robbery conviction. If found meritorious, several of those claims would provide sufficient bases for invalidating the *murder* conviction as well as the robbery conviction. *See supra* p. 3.

Further proceedings in both courts below must occur before a final judgment can reach this Court. Completion of those proceedings may provide other, independently sufficient, bases for the partial relief ordered thus far and may warrant additional relief. At this point, therefore, the Court cannot review the entire case

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[4]The State (Pet. 4, 6-8) says Mr. Houston's signed statement describes a "wrestling match" after the victim was shot; the statement says the opposite — the shooting *ended* the struggle. T. 455-56. The State claims there was a "relatively wide separation of the victim's three wounds (mouth, chest, [stomach])"; however, if the victim was shot while his upper body was being pulled forward by the tug-of-war over the gun (as Mr. Houston's statement and the bullet trajectories and wall damage indicate), the entrance wounds were only a few inches apart. T.R. 20, 26. The State says the suspect "walk[ed] past" Hill; in fact, Hill was in *front* of the station and the suspect was *behind* it, 50 feet away, walking in the opposite direction, with his back to Hill. T. 490-92; Ex. 37. The State says Mr. Houston parked his car "up the street" from the station; in fact, Mr. Houston's car was parked "right behind the service station." T. 486. The State says that the force of a bullet fired by the large caliber pistol, even after passing through the victim, was "severe" enough to cause "a broken tile and bullet mark on the rear wall of the restroom"; it offers no explanation of how two large caliber bullets supposedly fired downward through the victim while he was lying on a concrete floor left no marks on the floor. Nor does it offer an explanation for two of the three impact marks on the rear wall.

or even all potential bases for the partial relief granted below. To avoid piecemeal and unnecessary proceedings, this Court treats nonfinal judgments as "not yet ripe for review" on certiorari. *Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*). "[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree," and an absence of finality provides "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). As set forth below, there is nothing about this case that warrants certiorari even from a final judgment. There certainly is nothing that makes the case sufficiently "extraordinary" to justify review in its current, *non*final posture.

II. The Legally Scrupulous, Factually Supported, and Case-Specific Determination of the Courts Below that the Jury Was Substantially and Injuriously Affected by Instructions to Presume an Element of the Offense and Reject the Accused's Defense Presents No Issue Worthy of Review

Tennessee's "definition of first-degree murder require[s] the state to prove that 'the killing [was] done ... *maliciously*, that is, with malice aforethought.'" *State v. Brown*, 836 S.W.2d 530, 538 (Tenn. 1992) (citation omitted). Malice requires an actual, subjective mental state with regard to the killing. App. 11. "Express malice" is an intent to kill the victim that is manifested by "external circumstances" such as ill will.[5] "Implied malice"

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[5] *Humphreys v. State*, 531 S.W.2d 127, 133 (Tenn. 1975) ("Express malice [is] 'a ... formed design [to] kill[] another; which formed design is evidenced by external circumstances discovering the inward intention'" (quoting *Warren v. State*, 44 Tenn. 130, 135 (Tenn. 1867)). *See Welch v. State*, 836 S.W.2d 586, 591

is a decision to engage in the fatal act notwithstanding actual, subjective "knowledge" that the act imperiled the victim's life[6] – what Tennessee law has long defined as "that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief." *Fox v. State*, 441 S.W.2d 491, 496 (Tenn. Cr. App. 1969).

The jury was so instructed at Mr. Houston's trial:

> "'Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.'" App. 8 (quoting T. 602).

Applying these definitions, the Tennessee courts have repeatedly held that, absent actual proof of a subjective mental state as to the killing (*i.e.*, design, knowledge, or an actual awareness of a high risk of death), malice is *not* present even if death was caused by a *clearly unlawful act* committed in a *grossly negligent manner*.[7] As a result, the fact that a "shooting was

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(Tenn. Cr. App. 1992) ("malice ... [is] an intent to do harm or cause injury to another").

[6] *State v. Johnson*, 541 S.W.2d 417, 418 (Tenn. 1976) ("a consciously unlawful act done intentionally and with knowledge on the part of the accused that the act was directly perilous to human life"). *See State v. Randolph*, 676 S.W.2d 943, 947 (Tenn. 1984) ("conscious indifference to the consequences of [one's] ... activities").

[7] *See, e.g., State v. Martin*, 702 S.W.2d 560, 562 (Tenn. 1985) (striking victim in face with pistol did not establish malice murder if "pistol accidentally discharged," killing victim); *State v. Atkins*, 681 S.W.2d 571, 577 (Tenn. 1984), *cert. denied*, 470 U.S. 1028 (1985) (malice not present if "defendant did not intend death nor bodily harm when he shot the victim and [instead] death was accidentally caused by [the] unlawful act"); *State v. Randolph*, *supra*, 676 S.W.2d at 946-47, 948 (death caused by felonious sale of "uncut" heroin does not establish malice absent actual proof that defendant intended to kill or knew death was likely; "'death ... accidentally caused by an unlawful act' is involuntary manslaughter, not murder); *Lewis v. State*, 304 S.W.2d 322, 324-25 (Tenn. 1957)

accidental ... negate[s] the element of malice."[8] Moreover, as both Tennessee appellate courts and both federal courts below

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(proof that killing "was accidental" and occurred when "defendant ... pointed the pistol, unlawfully carried, at deceased ... make[s] him guilty of involuntary manslaughter," not malice murder); *Letner v. State*, 299 S.W. 1049, 1050 (Tenn. 1927) (unlawfully discharging gun in direction of boat with intent to scare occupants but without thinking that shot would kill one of them is involuntary manslaughter not malice murder); *Shorter v. State*, 247 S.W. 985, 986-87 (Tenn. 1923) (overturning murder conviction based on instruction to find malice if driver was exceeding lawful speed limit when fatal accident occurred; "if the motorist was running in excess of [the speed limit], without knowledge that he was endangering the lives of others, ... he would only be guilty of manslaughter"); *Lee v. State*, 41 Tenn. 62, 66-67 (1860) ("where ... neither death, or any bodily harm, was intended, but death is accidentally caused by some unlawful act," offense is manslaughter; offense is not murder unless defendant, in addition, "manifests a heart regardless of social duty" because "he saw ... the mischief likely to ensue, and yet [continued]" — *i.e.* unless the accused "deliberately saw the danger [of death], or betrayed any consciousness of it").

[8]*Phillips v. Rose*, 690 F.2d 79, 81-82 & n.5 (6th Cir. 1982) (loaded shotgun discharged when defendant beat victim with it; malice not present if "shooting was accidental"). *See State v. Martin*, *supra*, 702 S.W.2d at 562-63 (malice question is "close" where defendant admitted hitting homicide victim with loaded pistol but said "pistol accidentally discharged"); *Smith v. State*, 370 S.W.2d 543, 545 (Tenn. 1963) (accidental killing as result of intentional discharge of pistol under condition of "stress" is not malice murder); *Harper v. State*, 334 S.W.2d 933, 935 (Tenn. 1960) (malice not present if "homicide was a result of an accident"); *Mullins v. State*, 299 S.W. 1052, 1054 (Tenn. 1927) (intentionally striking victim with rifle that discharged, killing victim, was malice murder if defendant intentionally cocked gun just before striking victim, but manslaughter if not); *State v. Gore*, 1991 WL 235232, at *3 (Tenn. Cr. App. Nov. 13, 1991) (if proved, "accidental killing" negates charge that defendant "maliciously killed the victim," as where shotgun "negligent[ly]" pointed at victim fired twice due to hair trigger and defendant's having stumbled); *Brewer v. State*, 1991 WL 21605, at *8 (Tenn. Cr. App. Feb. 22, 1991) (malice negated if "shooting took place after a struggle with the victim and was accidental"); *State v. Korpan*, 1991 WL 1345, at *6, *7 (Tenn. Cr. App. Jan. 11, 1991) ("defense of accident" — "that the killing was done maliciously rather than accidentally" during an argument — may be proved by showing "abnormalities in the trigger pull of the pistol" or that victim had "come at appellant" or "threatened him by word or deed"); *State v. Bounds*, 1989 WL 92215, at *2 (Tenn. Cr. App. Aug. 17, 1989) (proof of accidental shooting in struggle over gun while defendant was attempting to collect on bookmaking debt — *e.g.*, if gun "ha[d] a hair trigger" — would negate malice); *State v. Griffin*, 1987 WL 9715, at *2 (Tenn. Cr. App. Apr. 23, 1987) (malice not present if killing was result of accidental firing of rifle during struggle); *State v. Kerley*, 1986 WL 9777, at *2 (Tenn. Cr. App. Sept. 9, 1986) (question for jury "was whether [death] was accidental or whether it was a premeditated, deliberate, malicious killing"); *State v. Sims*, 1986 WL 1040, at *2, *3 (Tenn. Cr. App. Jan. 21, 1986) (question whether malice was present turned on whether jury believed pistol discharged during "scuffle over the gun" when "'[b]oth of us was holding the gun'"); *Armes v. State*, 540 S.W.2d 279, 285 (Tenn. Cr. App. 1976) (malice murder not present if "evidence ... comport[s] with the defendant's insistence that this was an accidental shooting"); *Bailey v. State*, 479 S.W.2d 829, 834 (Tenn. Cr. App. 1972) (malice not present "if the shooting was accidental"); *Bunch v. State*, 463 S.W.2d 956, 958 (Tenn. Cr. App. 1970) (if firing of pistol was "accidental" result of "argument and struggle," malice murder not present).

found, the question whether the shooting of Stanley Balsinger was malicious (as the state contended) or accidental (as Mr. Houston contended) was the decisive issue at Mr. Houston's trial.[9]

Two instructions relieved the State of the burden of proof on this decisive issue. Both required the jury to "*presume[]*" malice unless Mr. Houston "rebutted" it.[10] As the State conceded below, both instructions violated the due process rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979). Pet. 17.

After comprehensively reviewing the record (App. 3-5, 10-12, 21-23, 37-39), both courts below concluded that the invalid instructions were not "harmless" under the test of *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), and *O'Neal v. McAninch*, 115 S. Ct 992 (1995). App. 10-13, 37, 71. As the Court of Appeals found, "[a]ccident was the only defense," and "[t]he instruction to presume malice from the unrefuted facts of an unlawful killing and

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[9] *See Houston v. State*, 593 S.W.2d 267, 269 (Tenn.), *cert. denied*, 441 U.S. 891 (1980) (State argued that Mr. Houston shot the victim twice in cold blood while the victim was prone; defense was that "the robbery was a spur-of-the-moment action, that Mr. Balsinger grabbed the gun, that [Houston] sought to break away and escape, and that the gun went off accidentally in the struggle"); *Houston v. State*, CCA No. 912 at 3 (Tenn. Cr. App. Nov. 8, 1984) (State argued that "appellant 'executed' Mr. Balsinger"; defense was that "[o]n impulse [Houston] decided to rob the owner ... [who] grabbed the barrel of the pistol and a struggle ensued. The gun then discharged accidentally, killing Mr. Balsinger"); App. 37 ("Whether the killing was accidental or malicious was central in the testimony as well as the closing arguments"); App. 12, 11 ("the prosecutor's theory argued repeatedly and vigorously [was] that Houston robbed the owner ... and then ... 'executed' him"; "defense was that the killing occurred by accident as a result of a struggle over the gun, a theory inconsistent with malice").

[10] "'If the State proves beyond a reasonable doubt that a killing has occurred, it is *presumed* to be malicious unless rebutted by other facts and circumstances to the contrary.'"

"'The use of a deadly weapon by the party killing, when shown, raises a *presumption* of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.'" App. 8 (quoting T. 602-03).

the use of a deadly weapon essentially told the jury to reject petitioner's claim that the shooting was accidental." App. 10-11. "By thus destroying defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant." App. 11.

Prejudice extended beyond the "malice" element. "[T]he malice instruction had the effect of telling the jury to presume 'that the killing was subjectively contemplated beforehand — and thus that the killing was not accidental — [which] utterly wiped out Mr. Houston's single and, on the evidence, substantial accident defense.'" App. 11 (citation and emphasis omitted). Because Mr. Houston's substantial evidence of accident could have "'negated not only malice but also willfulness, premeditation, and deliberation,'" the instructions "'removing the accident defense unconstitutionally left Mr. Houston with *no* defense, and paved the way to a finding of all four mental elements.'"[11] *Id.*

The State asks the Court to plunge into the record to see if it can find something on the harmless error issue that all four judges below missed. The State, however, offers no reason for the Court to expend its resources in this way. It points to no evidence that the courts below failed to consider. It concedes that both courts applied the proper legal standard of *Brecht* and *O'Neal*.[12] Although it baldly asserts that "the lower federal

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[11]In closing argument, the prosecutor "used the presumption of malice effectively to include the other elements of first degree murder." App. 12.

[12]Pet. 17. The Court of Appeals also applied the *Brecht* standard to deny Mr. Houston relief on two claims. App. 14-16.

courts require this court's guidance concerning the proper application of the habeas corpus harmless error standard to jury instructions containing unconstitutional mandatory rebuttable presumptions," Pet. 15, it cites *not a single lower court case* — much less one evincing confusion as to the proper application of *Brecht* in *Sandstrom* cases.[13] Nor does it explain what review here would add to the Court's recent harmless error analysis of a *Sandstrom* violation in *Yates v. Evatt*, 500 U.S. 391 (1991) — especially given that *Yates* and the instant case involve nearly the same definition of malice, the same unconstitutional instructions to presume malice, and facts as nearly identical as two cases are likely to present.[14]

What the State does, in lieu of providing any reason to grant certiorari, is to repeat the argument it unsuccessfully made below

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[13]Lower courts routinely apply the *Brecht* standard to *Sandstrom* error without difficulty or dissent. *See Anderson v. Butler*, 23 F.3d 593, 597 (1st Cir.), *cert. denied*, 115 S. Ct. 331 (1994); *Libby v. Duval*, 19 F.3d 733, 738 (1st Cir.), *cert. denied*, 115 S. Ct. 314 (1994); *Moore v. Lewis*, 1994 U.S. App. LEXIS 14231 at *2 (9th Cir. June 1, 1994); *Goodwin v. McQuen*, 1994 U.S. App. LEXIS 3439 at *3 (10th Cir. Feb. 24, 1994); *Arney v. Roberts*, 1993 U.S. App. LEXIS 27627 at *8 (10th Cir. Oct. 21, 1993); *Jacoby v. Lewis*, 1993 U.S. App. LEXIS 25544 at *2 (9th Cir. Sept. 30, 1993); *Ruff v. Kincheloe*, 1993 U.S. App. LEXIS 20160 at *4 (9th Cir. Aug. 3, 1993).

[14]In *Yates*, as here, (1) the instruction defined malice as "wickedness, ...a depraved spirit, ... a heart devoid of social duty, and fatally bent on creating mischief," *Yates v. Evatt*, *supra*, 500 U.S. at 396; (2) state law made critical the question whether the robbers killed maliciously or inadvertently, *id.* at 411; (3) the court twice instructed the jury to presume malice, *id.* at 396 ("Malice is ... presumed ... from the ... doing of an unlawful act without any just cause or excuse" and "from the use of a deadly weapon" unless "rebutt[ed] ... by the rest of the evidence"); and (4) the question whether the killing was malicious or the accidental result of a struggle over a weapon was central and pitted the defendant's account against the State's circumstantial theory, *id.* at 410-11 ("[t]here was no ... testimony on how Mrs. Wood encountered" her assailant other than the account of a "struggle" after Mrs. Wood "tried to grab" one of the robbers; the pathologist testified that the physical evidence was consistent with a stabbing in a struggle; and the defendant said he "left the [scene] not knowing whether he had, in fact, killed [the victim]").

on a record-dependent matter with no significance beyond this case. The specifics of its argument make certiorari particularly inappropriate. First, its argument is based entirely on a disagreement with the courts below on two matters of *state* law, namely, the courts' conclusions – as a matter of Tennessee law as defined at Mr. Houston's trial – (i) that accident negates malice and (ii) that malice is not established simply because death occurred as a result of an unlawful or felonious act.[15] Pet. 18-19. Second, in support of its argument, it cites *not a single Tennessee decision* – much less a decision saying that accident does not negate malice or that unlawful behavior suffices to establish malice. Third, the established law of Tennessee, reiterated in numerous decisions, is that accident *does* negate malice, and that unlawful behavior does *not* sufficiently establish that element. *See supra* pp. 9-11 & nn.7, 8.

Certiorari should be denied.

III. The Ruling Below that, on the Facts of this Case, State Courts Are the Proper Forum to Evaluate the Relative Strength of the Aggravating and Mitigating Circumstances Following the Invalidation of an Aggravating Circumstance Presents No Question Meriting Review.

The jury sentenced Mr. Houston to die after weighing the "heinous, atrocious or cruel" and two other aggravating circumstances against the substantial mitigating evidence in the case.[16]

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[15]The authors of both opinions below are experienced Tennessee jurists.

[16]Several clergy and family members testified to Mr. Houston's good character, lack of prior bad behavior, strong ties to the community, emotional and financial support for his family and children, record of continuous employment, service overseas in the military during the Vietnam War and honorable

The State concedes that reliance on the "heinousness" circumstance violated the Constitution because the Tennessee courts failed to define the facially vague terms of the circumstance at trial and on appeal, *cf. Maynard v. Cartwright*, 486 U.S. 356 (1988), and because there is no evidence based on which a rational sentencer could find that circumstance present once it is constitutionally defined, *see Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Pet. 22; App. 2, 13.

In identical circumstances, this Court's practice has not been itself to conduct harmless error analysis but instead to remand to the State courts to reevaluate the remaining aggravating and mitigating circumstances. "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the *state appellate court* or some other *state* sentencer must actually perform a new sentencing calculus, if the sentence is to stand." *Richmond v. Lewis*, 113 S. Ct. 528, 535 (1992) (emphasis added).[17] The Court of Appeals followed the Court's practice in this regard. J.A. 13-14. The State claims that the Court of Appeals' adherence to the Court's practice warrants certiorari.

Certiorari is inappropriate for four reasons. First, the State seeks a ruling that would have no affect on the case. The

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discharge, and severe emotional stress at the time of the offense due to the break up of his marriage. T. 555, 644-81; Ex. 44.

[17] *See Stringer v. Black*, 112 S. Ct. 1130, 1136-37, 1140 (1992) (rule is "well settled ... [that] use of a vague or imprecise ['heinousness'] factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the *state* judicial system" (emphasis added); remanding for state proceedings notwithstanding two valid aggravating circumstances — killing during commission of a robbery and to avoid arrest); *Parker v. Dugger*, 498 U.S. 308, 321, 322-23 (1991).

Court of Appeals invalidated Mr. Houston's murder conviction – the sole basis for his death sentence. No ruling on the "heinousness" issue can alter the need for a new trial on murder and, in the event of conviction, a new trial on sentence.

Second, this case does not present the issue the State wants reviewed – whether, *assuming state law would have permitted an appellate court to approve Mr. Houston's death sentence based on harmless error review*, the federal court should supplant the state court's harmless error analysis with its own analysis, using the standard of *Brecht v. Abrahamson*, *supra*. Pet. i, 21-23. For at the time of Mr. Houston's direct appeal, Tennessee law *automatically* required *jury* resentencing when an aggravating circumstance was invalidated.[18] Under these circumstances, the case is squarely controlled by this Court's holding in *Maynard v. Cartwright*, 486 U.S. 356 (1988).

In *Maynard*, Oklahoma pointed out that, as of the time of the federal ruling, the state courts "would not necessarily set aside a death penalty where on appeal one of several aggravating

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[18]*See, e.g., Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979) ("[g]iven the nature of the [capital sentencing] issue on trial," a single invalid aggravating circumstance requires a new trial despite five valid aggravating circumstances); *State v. Pritchett*, 621 S.W.2d 127, 139 (Tenn. 1981) ("necessary to set aside the death penalty and remand ... for ... a new sentencing hearing" where court "found the proof insufficient to support [the heinousness] aggravating circumstance"; "we ... cannot speculate whether the jury would have imposed the death penalty with [one circumstance] withdrawn ... and with the necessity of weighing the remaining aggravating circumstance against the mitigating circumstances"); *State v. Moore*, 614 S.W.2d 348, 352 (Tenn. 1981); *State v. Teague*, 645 S.W.2d 392, 399 (Tenn. 1983); *State v. Miller*, 674 S.W.2d 279, 284 (Tenn. 1984). The State admits that Tennessee has only applied a harmless error rule in *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993), and "in *subsequent* cases." Pet. 22 (emphasis added). *See State v. Branam*, 855 S.W.2d 563, 570 (Tenn. 1993) ("In the past, when this Court has set aside one of a number of aggravating circumstances as improperly submitted, we have generally held that the case must be remanded for a new hearing on punishment.").

circumstances had been found invalid or unsupported by the evidence" and instead would affirm if the error had no impact on the sentence. *Id.* at 365. Based on the state courts' practice, Oklahoma argued that this Court should *itself* apply harmless error analysis and let the death penalty "stand because ... one [aggravating factor] was unchallenged and is sufficient to sustain the sentence." *Id.* at 365. This Court rejected Oklahoma's argument, however, because "*[w]hen this case was decided*, ... the Oklahoma Court of Criminal Appeals would not attempt to save the death penalty when one of several aggravating circumstances was found invalid or unsupported," and because a federal court should not "undertak[e] what the state courts themselves refused to do" at the time the petitioner's sentence was reviewed. *Id.* (emphasis added). The "significance ... for the present case" of the Oklahoma courts' later decisions instituting harmless error review was "a matter for the *state* courts to decide in the first instance." *Id.* (emphasis added).

This case thus does not present the issue the State wants reviewed – which assumes that, at the time the Tennessee Supreme Court reviewed Mr. Houston's death sentence, it would have conducted harmless error review rather than remanding upon invalidation of the "heinousness" circumstance. Nor does the State ask the Court to reconsider the unanimous holding of *Maynard*, which governs in the circumstances that *are* present here. Although the State cites two cases supposedly in conflict with the decision below, both cases arose in States that, unlike Oklahoma and

Tennessee, have *always* allowed appellate courts to save death sentences imposed on the basis of an invalid aggravating circumstance without remanding for retrial.[19]

Third, the two cases the State cites do not support review of the question it proposes – even were that question actually presented here. The portion of *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir.), *cert. denied*, 115 S. Ct. 129 (1994), on which the State relies is *dicta*. Because the Fourth Circuit ruled that no federally cognizable "heinousness" error occurred, *id.* at 962-74, the case did not present the question of which forum should decide whether any cognizable error that *might* have occurred was harmless. Moreover, the Eighth Circuit in *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1397 (1995), did not apply the "substantial and injurious effect" harmlessness standard of *Brecht* that the State seeks here and instead applied the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967), that the State wants to keep the Tennessee courts from applying.[20]

Finally, the State concedes that, when state law requires an appellate court "to reweigh any remaining valid aggravators against any mitigating evidence in the record, ... reweighing can only be

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[19]The State cites cases arising in North Carolina and Nebraska. Pet. 21. Both States have always permitted appellate courts to cure death sentences originally imposed on the basis of an invalid aggravating circumstance. *See, e.g., State v. Goodman*, 257 S.E.2d 569, 587 (N.C. 1979); *State v. Reeves*, 344 N.W.2d 433, 447-48 (Neb. 1984).

[20]*Williams v. Clarke, supra*, 40 F.3d at 1541 (because the state courts did not actually conduct harmless error review in petitioner's case, "we apply the *Chapman* [rather than the *Brecht*] analysis to determine if the constitutional error that we have identified requires habeas relief").

performed by a *state* appellate [court]; federal courts lack the authority to impose sentence in state criminal cases." Pet. 23 (emphasis added). Yet, the ameliorative process the Tennessee Supreme Court now uses when an aggravating circumstance is invalidated – even assuming (contra *Maynard*) that Tennessee's recently initiated process applies in this case – requires precisely the weighing of aggravating and mitigating circumstances that Tennessee concedes cannot be conducted by federal courts.[21]

This case thus does not present the question the State proposes because neither of the question's premises is satisfied. The State assumes that appellate court reevaluation rather than jury resentencing is appropriate here. Yet, as *Maynard* holds, the question whether appellate reevaluation or jury resentencing is appropriate in this case is an unresolved matter of *state* law that is inappropriate for resolution by this Court. The State next assumes that any appellate reevaluation that might occur would entail something *other* than a weighing of the relative strength of the remaining aggravating and mitigating circumstances. Yet, the appellate reevaluation in which the Tennessee Supreme Court recently has begun engaging entails just the kind of balancing of aggravation and mitigation that a federal habeas court admittedly cannot properly perform.

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[21] *State v. Howell*, 868 S.W.2d 238, 261-62 (Tenn. 1993), *cert. denied*, 114 S. Ct. 1339 (1994) (after invalidating an aggravating circumstance, court must compare the relative "strength of remaining valid aggravating circumstances" and "the nature, quality and strength of mitigating evidence," *i.e.*, it must compare "the qualitative nature of each [aggravating] circumstance, its substance and persuasiveness, as well as the quantum of evidence supporting it" and "the quantum and quality of the mitigating factors presented by the proof").

Certiorari should be denied.

CONCLUSION

The Court should deny a writ of certiorari.

Respectfully submitted,

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